

**REDACTED DECISION – DK# 12-015 RMFE – BY – GEORGE V. PIPER,
ADMINISTRATIVE LAW JUDGE – SUBMITTED DECISION on MAY 23, 2012 - ISSUED
ON NOVEMBER 23, 2012**

SYNOPSIS

TAXATION-- PROCEDURE AND ADMINISTRATION -- It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

WEST VIRGINIA OFFICE OF TAX APPEALS --BURDEN OF PROOF -- In a hearing before the West Virginia Office of Tax Appeals on a petition for refund, the burden of proof is upon the petitioner to show that it is entitled to the refund. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code R. §§ 121-1-63.1 and 69.2 (2003).

TAXATION -- PROCEDURAL RULE FOR THE USE AND ACCEPTANCE OF ELECTRONIC RECORDS -- Pursuant to W. Va. Code R. § 110-10D-4.4 which is a “Procedural Rule for the Use and Acceptance of Electronic Records” the filing for electronic purposes means that the return enters the information processing system designated or used by the Tax Commissioner so that it can be retrieved and is capable of being processed.

TAXATION -- RESPONDENT’S ELECTRONIC TAX INFORMATION PROCESSING SYSTEM -- Respondent’s testimony, which was un rebutted by the Petitioner, showed that based upon Respondent’s electronic tax information processing system, which was designated or used by the Tax Commissioner, it was absolutely impossible for the Petitioner to have simultaneously filed and withdrawn its tax return. Therefore, the return never entered the tax information processing system on October 31, 2011.

TAXATION -- MOTOR FUEL EXCISE TAX -- W. Va. Code Section 11-14C-31(c)(3) requires that an application for refund of motor fuel excise tax must be filed no later than October 31, 2011 for purchases of motor fuel made during the calendar quarter from July 1, 2011 through September 30, 2011.

TAXATION -- UNTIMELY FILED REFUND REQUEST -- Since the Petitioner’s refund request for the period of July 1, 2011 through September 30, 2011 was not electronically filed until December 1, 2011, Petitioner did not comply with the West Virginia Code Section 11-14C-31(c)(3) and its refund was not, therefore timely filed.

TAXATION -- UNTIMELY FILED REFUND NOT MORAL OBLIGATION -- W. Va. Code Section 11-14C-31(d) provides that untimely refund requests are not to be construed as a moral obligation of the State of West Virginia.

WEST VIRGINIA OFFICE OF TAX APPEALS -- BURDEN OF PROOF -- Petitioner did not carry its burden of proof showing that it was entitled to the refund. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code R. §§ 121-1-63.1 and 69.2 (2003).

FINAL DECISION

On December 1, 2011, the Petitioner, Petitioner, filed a claim for refund of \$ _____ ~~of~~ of motor fuel excise tax for the period of July 1, 2011 through September 30, 2011. By letter dated December 8, 2011, the Excise Tax Unit Manager of the Internal Auditing Division (“the Division”) of the West Virginia State Tax Commissioner’s Office (“the Commissioner” or “the Respondent”), denied the entire refund claim. The reason stated for the denial was that refund of fuel purchased during the time period of July 1, 2011 through September 30, 2011 must be filed with a postmark date of no later than October 31, 2011 and therefore, Petitioner’s claim for refund filed on December 1, 2011 was untimely filed, in violation of W. Va. Code § 11-14C-31(c)(3) [2003].

Thereafter, by mail postmarked on January 17, 2012, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for refund. *See* W. Va. Code §§ 11-10A-8(2) and 11-10A-9(a)-(b)(West 2010).

Subsequently, a notice of hearing on the petition was sent to the parties and a hearing was held in accordance with the provisions of West Virginia Code Section 11-10A-10.

FINDINGS OF FACT

1. Petitioner, which is located in a West Virginia city in a West Virginia County in West Virginia is engaged in the business of off-road coal hauling.
2. Sometime before December 1, 2011, the Petitioner, having not received its motor fuel excise tax refund for the third calendar year quarter of 2011, contacted Respondent by telephone and was informed that the tax return had been electronically withdrawn by Petitioner on October 31, 2011 and therefore, was never filed. Whereupon, Petitioner filed electronically for the refund on December 1, 2011 for the third quarter of 2011.

3. Once the electronic filing of a tax return is made by a taxpayer using the proper passcode it cannot be withdrawn, pursuant to the “My Taxes” electronic tax information processing system, which was designated or used by the Respondent.¹

4. The electronic tax information processing system utilized by Respondent issues a confirmation number for all electronically filed tax returns as well as issuing confirmation numbers for tax returns, which were never filed but withdrawn before any filing had taken place.

5. Based upon Respondent’s electronic tax information processing system, it showed that Petitioner’s third quarter 2011 motor fuel tax refund was withdrawn on October 31, 2011 at 9:20 p.m. It also showed that another refund for the same period was filed on December 1, 2011 at 5:40 p.m., which was reported back to the September filing period on December 8, 2011.

DISCUSSION

The only issue for determination is whether Petitioner has shown that it is entitled to the motor fuel excise tax refund previously denied.

W. Va. Code § 11-14C-9(c)(15) does provide a refundable exemption from motor fuel excise tax on fuel purchased in quantities of twenty-five (25) gallons or more for use as a motor fuel in internal combustion engines not operated upon the highways of the state. However, W. Va. Code § 11-14G-31(c)(3) requires that such an application for refund must be filed no later than the thirty-first day of October for purchases of motor fuel made during the immediately preceding calendar quarter, which in this case would run from July 1, 2011 through September 30, 2011.

W. Va. Code Section 11-14C-31(d) provides that untimely refund requests are not to be construed as a moral obligation of the State of West Virginia.

¹ The passcode serves as an electronic signature.

In this case, Petitioner stated in both its petition for refund and during the evidentiary hearing that she must have inadvertently hit the withdrawal button on her computer at the same time that she was filing the tax return and therefore, the return was actually filed and then withdrawn. However, Respondent showed by its three witnesses, whose testimonies went unrebutted by the Petitioner that its “My Taxes” electronic tax information processing system absolutely precludes any such simultaneously filing and withdrawal of the tax return. Further, that the system issues a separate confirmation number if a return is withdrawn, even if it was never filed.

Respondent submitted into the record, Title 110, Series 10D, “Procedural Rule for the Use and Acceptance of Electronic Records” citing Section § 110-10D-4.4 as follows, to wit: A return that is filed by electronic means shall be treated as filed on the date the electronic return is transmitted if 1.) the return enters an information processing system that the Commissioner has designated or uses for the purpose of receiving electronic records and from which the Commissioner is able to retrieve the electronic record transmitted; and 2.) the return is in a form capable of being processed by that system.

Accordingly, an electronic return can only be deemed to be timely filed if it’s received in the proper format through this designated information processing system and/or before its statutory due date.

Respondent’s testimony clearly showed that it was electronically impossible for the Petitioner to have filed and simultaneously withdrawn its tax return. Therefore, the refund request was never timely filed on October 31, 2011.

It should also be noted that West Virginia Code Section 11-14C-31(d) provides that untimely refund requests are not to be construed as a moral obligation of the State of West Virginia.

CONCLUSIONS OF LAW

1. It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

2. In a hearing before the West Virginia Office of Tax Appeals on a petition for refund, the burden of proof is upon the Petitioner to show that it is entitled to the refund. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code R. §§ 121-1-63.1 and 69.2 (2003).

3. Pursuant to the W. Va. Code R. § 110-10D-4.4 which is a “Procedural Rule for the Use and Acceptance of Electronic Records” the filing for electronic purposes means that the return enters the information processing system designated or used by the Tax Commissioner so that it can be retrieved and is capable of being processed.

4. Respondent’s testimony, which was un rebutted by the Petitioner, showed that based upon Respondent’s electronic tax information processing system, which was designated or used by the Tax Commissioner, it was absolutely impossible for the Petitioner to have simultaneously filed and withdrawn its tax return. Therefore, the return never entered the tax information processing system on October 31, 2011.

5. W. Va. Code Section 11-14C-31(c)(3) requires that an application for refund of motor fuel excise tax must be filed no later than October 31, 2011 for purchases of motor fuel made during the calendar quarter from July 1, 2011 through September 30, 2011.

6. Since the Petitioner’s refund request for the period of July 1, 2011 through September 30, 2011 was not electronically filed until December 1, 2011, Petitioner did not comply with the West Virginia Code Section 11-14C-31(c)(3) and its refund was not, therefore timely filed.

7. W. Va. Code Section 11-14C-31(d) provides that untimely refund requests are not to be construed as a moral obligation of the State of West Virginia.

8. Petitioner did not carry its burden of proof showing that it was entitled to the refund. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code R. §§ 121-1-63.1 and 69.2 (2003).

DISPOSITION

WHEREFORE, it is the Final Decision of the West Virginia Office of Tax Appeals that Petitioner's petition for refund of \$ _____ of motor fuel excise tax, for the period of July 1, 2011 through September 30, 2011 must be and is hereby **DENIED**.

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____
George V. Piper
Administrative Law Judge

Date Entered